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SUPREME COURT

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 55.

ANDREW C. KEELEY, TRUSTEE, AND RICHARD K. PAYNTER

vs.

JOSEPH H. MOORE, *Et Al.*

Motion for Rehearing and Brief in Support.

H. T. TAGGART,
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Attorneys for Plaintiffs in Error.

PRESS OF BYRON S. ADAMS.

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MOTION FOR REHEARING AND BRIEF IN SUPPORT.

Now come the plaintiffs in error and move the Court to grant them a rehearing in this case, for the reasons set forth in the brief in support of the motion herewith filed.

H. T. TAGGART,
C. C. COLE,
LEO SIMMONS,
Attorneys for Plaintiffs in Error.

ARGUMENT.

This case contains twenty assignments of error, all of which seems to us well supported by good authorities, and we feel constrained to call attention to some of them and to some facts shown in the record, which we believe were overlooked by the Court.

This first is in relation to the admissability of the evidence given by witnesses for the defendants in relation to the fact of a will of William Thomson being on file in the English court, and is treated under the first and second assignments of error; pages 29 to 35 of the plaintiff's brief.

Mr. Pritchard, one of said witnesses, said, Rec., p. 19, "the original will of William Thomson has been duly proved in form of law and the probate of it would be accepted as evidence of a will in all courts of justice in this country."

Several of the other witnesses made similar remarks. There is no issue in this case that this statement tended to prove. The answer was objected to and an exception noted to same, record, p. 18. It cannot be said that a statement made to a jury, that the paper would be accepted as evidence of a will in all courts of justice in the country where it was made did not prejudice the rights of the party objecting. Would not any layman from the fact that a "will had been duly proved in form of law, and that the probate of it would be accepted in all courts of justice" in another country conclude that it should be good in any place?

It must appear that this evidence did not and could not, beyond doubt, have prejudiced the rights of the party objecting.

Boston and Albany R. R. Co. v. *O'Rielly,* 158 U. S., 334, cited on p. 32 of brief for plaintiffs in error.

The whole of the evidence taken in relation to the will being on file in England is of similar prejudicial character, and the cases cited clearly maintain the proposition that it was error to admit this evidence; we ask a careful review of this part of the case. Brief, pp. 29 to 37.

The next question arises under the sixth assignment. brief, p. 38. To hold that the paper purporting to be a copy of the will of Thomson, Rec., p. 26, was admissible in evidence without any showing whatever that the original or duplicate could not be produced would seem to be in contravention to all the authorities on the subject relating to the admissibility of secondary evidence.

If the original paper or the duplicate could not be produced, it cannot be said that the defendants were not required to show that to be the fact, by some evidence, as was said in the case of *Robertson* v. *Pickerel,* cited on p. 34 of the brief. Some reason should be given for its non-production.

In *Owens* v. *Hull,* 9 Pet., 606, the case was as to the admissibility of a copy of a bill of sale of certain slaves. The Court said:

> "The next objection was that the copy of the original bill of sale of the slaves to Hull on record in the notary's office was not evidence, unless the plaintiff accounts for the non-production of the original. The validity of this objection depends upon the consideration whether the non-production of the original was sufficiently accounted for. It was not accounted for by any proof offered on behalf of the plaintiff, and unless the Circuit Court could judicially take notice of the laws of Louisiana there was nothing before the Court to enable it to say that the non-production of the orginal was accounted for. We are of the opinion that the Circuit Court was bound to judicially take notice of the law of Louisiana."

> The Court held that because said law prohibited the removal of the original from the office where it was filed the copy could be used in evidence as the best evidence obtainable.

There is no evidence whatever in this case to meet this requirement, and the Court cannot take judicial notice of the law of England, even if there was any law prohibiting the taking away of original papers.

The question as to the duplicates is treated fully under the sixth assignment; pp. 38, 39, 40 and 41 of brief. We believe that this is the first time that this Court has held that a copy of a paper of the character mentioned (namely, one that takes effect as a deed) could be admitted without some evidence tending to show that the original or the duplicate original could not be produced. Furthermore, it appears that the duplicates are to be taken together as constituting the will. The cases cited on pages 41 and 42 of the brief are clear to the point that both papers should have been produced or properly accounted for. If either of these papers had been produced, the place of the certificate would have appeared, and it would have been shown that it had no relation to the attestation of the instrument.

The next matter to which we desire to call the Court's attention has relation to one of the instructions given on behalf of the defendants in the case. It is said by this Court in its opinion, p. 3, referring to the certificate of Cooksey:

> "That the jury might properly draw the conclusion that it (the certificate) was signed in the testator's presence."

By this, the Court evidently means no more than that the submission of the certificate to the jury as a fact or circumstances tending to support such conclusion would have been proper.

But the fact is, the case was not left to the jury to draw the conclusion. The trial Court, by the defendant's third prayer, Rec., p. 56; see brief, p. 20, instructed the jury as follows:

> "The jury are instructed as a matter of law that the introduction of the will in this case by the defendants, and the testimony accompanying same, constitute *prima facie* evidence that the said will was signed by Thomson and duly attested to pass real estate in the District of Columbia."

There was no evidence in the case whatever other than the bare finding of Cooksey's signature on the certificate to support it as an attestation and to satisfy the fundamental statutory requirement of a signature in the presence of the testator; and at all events it was the province of the jury to find whether or not the staute had been complied with in this respect.

Clark v. *Turton*, 11 Ves. Jr., and cases cited in the brief, pp. 45 to 52, are conclusive to the point that the certificate in this case did not constitute *prima facie evidence.*

By this instruction the Court did not leave it open to the jury to find from inference by presumption or in any other way that Cooksey did not sign the certificate in the presence of the testator. The Court decided the question of fact for the jury; and if there had been no other issue in the case, and the jury had returned a verdict for the plaintiff, would not the Court, if this instruction was proper, have been bound to set aside the verdict as contrary to it.

The converse of the proposition must be true. If this instruction was improper and the jury found in accordance with it, the verdict should be set aside.

The next question we desire to call the Court's attention to is to the instruction given by the fourth, sixth and seventh prayers of the defendants, Rec., p. 57; brief, pp. 75 to 89, and coming under the fifteenth, sixteenth and seventeenth assignments.

By composition of parts of prayers four, six and seven granted on behalf of the defendants the injury will plainly appear, when considered in connection with the evidence applicable to them.

> (Prayer fourth.) "In the District of Columbia the capacity of a person to make a valid deed or contract is the test of capacity to make a valid will." (Prayer sixth.) *"The jury are instructed as a matter of law that the testamentary capacity of William Thomson need only have existed at the time of making the will in question."* (Prayer seventh.) "The jury are further instructed that there is no evidence in this case of any opinion of any non-expert witness that William Thomson was, at the time he made said will incapable of making a valid deed or contract; nor is there any statement of any non-expert witness as to the mental incapacity of William Thomson to make a valid deed or contract at the time said will was executed."

The Court will bear in mind that by the third section of the Act of Md., 1798, referred to on page 2 of the opinion, it is made a condition precedent to the valid execution of a will that a *testator shall be of sound disposing mind.*

The will was executed, it was contended, on the 24th

and 25th of February, 1886. This Court in its opinion, p. 6, finds there was evidence of insanity during the month of February. The witnesses for the plaintiff did not say in express words that the man was incompetent to make a will. They were not asked such question. It was their duty to state the facts and allow the jury to draw the conclusion as to the testator's competency to make a will. It is certainly no reason for holding that there was not evidence in the case tending to show the testator was mentally incompetent to make a will at the time the will was executed, because no one says so in express words. If I say a man came to my house, entered the door and took away my coat, I do not say, in express words, he is a thief, but I undoubtedly charge him with the act of stealing, and in effect say that he is a thief. *One witness in this case said in express words that she "thought" Thomson was just as insane after his return from the asylum as before he was taken there, if not worse.* In view of this testimony of Annie Lowman how can it be properly said that there was no evidence of an opinion by any non-expert witness that the testator was incompetent at the time of making the will, to execute a valid deed or contract? Hiscock testified to such a condition of facts in the testator's behavior before and during the entire month in which the will was executed, as of necessity involved such an opinion on his part.

The Court says in the opinion, p. 6, that he was undoubtedly insane at the time of his admittance to the asylum, and from which he was paroled in charge of an attendant on February 1, 1886. Annie Lowman, one of his domestic servants, who remained with him during February and part of the month of March, Rec., p. 28, says:

> "That from what she saw of him she thought he was just as insane as before he went to the asylum, if not worse."

Hiscock, his clerk for six years, testified, Rec., p. 30, that after his return from the asylum he never appeared to be in his normal condition again, mentally or physically.

Furthermore, Annie Lowaman testified, Rec., p. 29, that Cunningham, who, with his children, are the principal beneficiaries under the will, was not at Thomson's house "until after his return from the asylum; after that he spent most of his time there, sleeping elsewhere at night."

If Thomson was sane and capable of managing his affairs, what occasion was there for this man's constant presence at the testator's house?

In view of this was it proper for the Court to say to the jury that there was no evidence of any opinion of any non-expert witness of the mental incapacity of Thomson at the time of making the will? Might not the jury have taken this as the equivalent of a statement to them, that there was no evidence in the case tending to show insanity or incompetency on the part of Thomson at the time of executing the will?

This Court has said that a trial court has no right even to call the attention of the jury to weak points in the evidence, and certainly if it has no right to call the jury's attention to a weak point in the case, it has no right to say there is no evidence when in fact there is. (See brief, pp. 82 to 86.)

It is said by this Court in its opinion that the evidence of insanity was quite unsatisfactory; page 5: and at p. 6 that the evidence of insanity was very slight. We desire to call the Court's attention to some particular parts of the evidence on this question. It is shown by the evidence of William Weir, Jr., Rec., p. 42, that about the 1st of October, 1885, it was discovered that Thomson was insane.

> "He wanted to go out in the street without any clothing on; he took up hot coals of fire with his bare

hands. He blew out a candle and took it in his mouth and sucked it like a child. He would get up and dress and in about three minutes would undress again. He would walk about the drawing room and bow and say good evening and good morning when there was no one there. He stuffed his clothing with paper and tried to set them on fire. He threw ornaments from the mantel through the windows. That they had to put his food in his mouth when he ate. That they had to have a regular attendant for him," etc.

Annie Lowman, his servant, Rec., p. 26, testified to similar acts, and that she was afraid of the man; that he acted generally like a madman.

The witness Hiscock, Rec., p. 29, testified to similar acts. While in the asylum he wrote letters, Rec., p. 39, and dated them in 1869, while the time the same were written was in 1886. He wrote to young Weir for tobacco, which he had never used before. Dr. Manning says, Rec., p. 36, he imagined while at the asylum he was in New York, and that people he never saw before were his intimate friends. By this alleged will he failed to make provision, as he had in his former will, for bringing his body to this country for burial. Weir, Sr., Ev. (Rec., p. 49), his father and mother were insane before him. Weir, Sr., and Jr. Ev.

Such actions as these can leave no doubt of Thomson's insanity at the time of his commitment to the asylum, and the testimony of Lowman and Hiscock above mentioned is to the effect that it continued during the month of February, 1886.

This Court says the man was discharged as probably cured. Dr. Manning says in his deposition, Rec., p. 36, the man was suffering from Bright's Disease.

> "I am of the opinion that the mania was the result of weakness following disease of the kidneys and old age." (Rec., p. 37.)

This, it would seem, corroborates Lowman's and Hiscock's evidence: neither Bright's disease nor old age are curable.

As against this positive proof of insanity we have the deposition of Mr. Lomer, admitted to be an attorney for the defendants in error; Mr. Linthorne, his clerk, and the bare statement of the witness Cooksey, who said, Rec., p. 16, that he recollected the time in February, 1886, when Mr. Thomson came to see his father.

> "And I say at that time, so far as I could judge, Mr. Thomson was perfectly sane and in good health."

Mr. Lomer says he never met the man until about the 15th of February, 1886. Mr. Linthorne never saw him until the 24th, the day the alleged will was executed. Two of these three witnesses were entire strangers to the testator, and the third did not pretend to testify to anything positive, a mere guess on his part; while the witnesses for the plaintiffs, on the other hand, had known him for years, and gave acts and doings clearly showing a mentally unbalanced mind.

They had ample opportunity to judge of his condition, while the others had only slight. In this condition of the proof, was it not wholly unwarranted on the part of the trial Court to say, as was in effect done by it, that there was no evidence of mental incapacity at the very time this will was executed?

Would any person have purchased the property in question of Thomson at the time the alleged will was dated, and paid for same knowing his condition?

Where will there be another case found of a man who had made a will while in good health, and later gets out of

an insane asylum and rushes to a lawyer's office, so to speak, to make another wholly different one?

The next matter which we deem worthy of consideration by the Court has relation to the Cooksey certificate. The Court says, p. 5 of opinion:

> "If the certificate was an official act and material as a separate acknowledgment of the execution of the will, as an acknowledgment of a deed, the case will be different since it has never been supposed that a notary who takes an acknowledgment of a deed could be counted as a witness to the deed without a separate signature. But here the certificate was an wholly unofficial act, and we see no objection to disregarding the words 'Vice-Consul of the United States' and treating it as an acknowledgment of the execution before a competent witness."

On page 3 the Court says:

> "But as it appears that Thomson not knowing when he would be in London, took the certificate to the 'Vice-Consul,' and that the latter signed it, the jury might properly draw the conclusion that it was signed in testator's presence. This would be the usual course of business, and the presumption is that Cooksey conformed to it and to his duty as a certifying officer."

Does the Court not hold thereby that the man was acting as an official, and that the act was an official act? And on the next page that the man was not acting officially, and that his act was not an official act? One or the other must be wrong. And does not the Court hold that the same presumption applies to either case as to facts not appearing in the certificate. What did the testator intend to do when he

first conceived the idea in his clouded brain that a certificate was necessary. His intention will show whether or not we can disregard the words "Vice-Consul of the United States." It must be borne in mind that Thomson had previously made a will, in his own handwriting, disposing of all his possessions, wholly different from this, and it had but two witnesses to it. (Weir, Sr., Ev.; Rec., p. 49; and see also Weir, Jr., Ev., Rec., p. 48.)

The testator spoke of getting the highest official representing the United States in England to perform the act of making the certificate, notwithstanding a third witness was at hand, if he wanted one. (Lomer's Ev.) He did not go to London, but saw the Vice-Consul and arranged with him to perform the act. The next day he proceeded to have the attorney prepare the certificate, using strictly an official form; still a third witness was present if he wanted one. After having the form of the certificate written he went or sent it to the Vice-Consul to be signed, to a person whom he expected to act in an official capacity, and to use the consulate seal in so doing.

The body of the certificate was written by Lomer, and not by Cooksey; the only function to be performed by the latter in connection with it was to sign it in his official capacity and attach the Consulate seal. This gratified to the fullest extent the understanding of all parties, and Thomson's presence was wholly unnecessary.

If Thomson was not present, the will is void; the certificate is silent on the point and there is no evidence *ali-unde* that he did in fact sign in Thomson's presence.

The evidence in this case is conclusive that nothing more than an official act was intended, and any other interpretation would be wholly in disregard, both of what Cooksey and Thomson meant to do.

The sole intention of the testator was to obtain an official certificate, and the ultimate purpose of it is wholly immaterial; all of the testimony is at variance with the idea that he was seeking a third attesting witness.

The law in relation to descents, which has been known and recognized since the beginning of the judicial system in England and the United States, always places the presumption in favor of the heir at law, and in order to remove this presumption a person who claims under a will must remove every doubt as to its valid execution

> "The heir at law may rest safely upon the presumption that the estate is cast upon him until this is done."

See Tyler on Ejectment, and other authorities cited on page 74 of plaintiff's brief.

The plaintiffs offered to show that it was a customary thing at the Consulate in question to execute certificates when the party to whom they were given was not present; and the Court refused to admit this evidence. (Rec., pp. 45, 46 and 47.; see 12th Assignment, brief, p. 64.)

And further, can it be said that when a man signs his will on each page, that a paper purporting to be a copy which does not contain both of such signatures is a copy. Which signature did Cooksey certify to—the one on first page or the one at the foot of the will? Can it be said that one is not just as important as the other? (See 19th Assignment, brief, p. 90.)

See also refusal to grant plaintiff's 8th prayer, 20th assignment, brief, p. 92.

A trial court should not give an instruction for the parties on one side, to the effect that there is no evidence on a

particular point, when there is such evidence: and refuse to give an instruction for the parties on the other side, that there is no evidence to support a charge or an assertion made to the jury by counsel, when there is no such evidence.

Respectfully submitted,

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